Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1625

JAMES K. MAYES, MOODY WADE, MIKE MOORE AND INDEPENDENT SCHOOL DISTRICT NO. 20 OF MUSKOGEE COUNTY, OKLAHOMA,
Petitioners,

v.

JON TOM STATON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners,

v.

JON TOM STATON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals entered in the above-captioned case on February 15, 1977.

CITATIONS TO OPINION BELOW

The decision of the Tenth Circuit Court of Appeals is not yet reported and is printed in Appendix A hereto, *infra,* p. 1a. The Memorandum Opinion of the United States District Court for the Eastern District of Oklahoma is not reported and is printed in Appendix B hereto, *infra,* p. 23a.

JURISDICTION

The judgment and decision of the United States Court of Appeals for the Tenth Circuit was entered on February 15, 1977. Rehearing was denied on April 11, 1977. Upon application of counsel for Petitioners, Associate Justice Byron R. White by order dated May 11, 1977 stayed the mandate of the United States Court of Appeals for the Tenth Circuit pending the filing of a response to the application for stay and further order.* Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. May a School Board which is the only body created by the state to employ and discharge teachers dismiss a superintendent of schools, after notice and a hearing, held in accord with existing statutory provisions, (a) when certain members of the school board have taken actions (as board members) in opposition to the superintendent and made public statements critical of the superintendent and his administration of the school system (b) when there is no provision in the state statute for disqualification or an alternative tribunal or review of the board's decision (c) when there is evidence in the record which would sustain the judgment and discretion of the board?

2. Notwithstanding that a school board in the exercise of its statutorily granted authority discharges a superintendent of schools, after notice and hearing, may a federal appellate court under the guise of fed-

* On May 6, 1977, the Tenth Circuit granted Petitioners request for a stay of its mandate to and including May 11, 1977. In view of the constriction of time counsel for petitioners filed on May 11, 1977 an application for stay A-933.

eral due process fashion a remedy that is left exclusively to the statutory powers of the state created board, contrary to this Court's pronouncement in *Hortonville Joint School District No. 1* v. *Hortonville Education Association*, —— U.S. ——, 96 S.Ct. 2308?

3. To what extent is the "Rule of Necessity" articulated by this Court and other state and lower federal courts limited or circumscribed by the procedure requirements of Due Process guaranteed by the Fourteenth Amendment?

STATUTES INVOLVED

Title 70 Oklahoma Statutes, § 6-103:

> "Upon hearing as hereinafter provided, any teacher may be dismissed at any time for immorality, willful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government, or any reason involving moral turpitude. Before any teacher may be dismissed, written notice of the proposed dismissal shall be given him by the board of education in independent school districts, * * *. Said notice shall contain a statement of the charges upon which a hearing is sought and by whom brought. The teacher complained of shall be notified of the date of the hearing, which shall be not less than ten (10) days from the date of said notice. The teacher shall be entitled to be present and to be represented by counsel. * * * In independent school districts it shall be before the board of education of such school district. In all cases a majority vote of those constituting the board, before which said hearing is held, shall be required in order to sustain the charges against the teacher charged * * *. Provided in cases involving incompetency or neglect of duty, the decision arrived at said hearing

shall be final and in those involving moral turpitude an appeal may be taken to the district court of the county."

Title 70 Oklahoma Statutes, § 6-122:

"The failure to renew a contract by the board of education of any teacher who has completed three (3) years shall not be effective, and such contract shall be renewed unless there is served on such teacher a written statement by such board containing a statement of causes for such action, affording the teacher an opportunity to appear and confront his or her accusers, having the right to cross examine and offer any evidence to refute the statements before such board and a reconsideration of the action theretofore made by the board.

Said notice of nonrenewal and the statement of causes shall be mailed on, or before, the 10th day of April notifying said teacher of the nonrenewal and a statement of causes. Said cause shall be set within twenty (20) days after receipt of said notice for a hearing before the board of education.

Before final decision of the matter the teacher shall be allowed to appeal the action of the board to the Professional Practices Commission. Such Commission shall allow the teacher to be heard and after reviewing the facts shall report its recommendation of the Professional Practices Commission, the State Board of Education if requested by the teacher, shall fix a date, hour and place for hearing of the matter within ten (10) days and notify the teacher of such time and place. At such hearing both the teacher and the local board of education shall be advised of the action of the Professional Practices Commission and be allowed to be heard. Such hearing may be held in executive session if agreed on by all parties concerned.

After review of the matter the State Board of Education shall issue its decision either confirming the action of the local board of education or issuing the finding that dismissal of said teacher was without cause and that said teacher was without fault in the premises, which decision shall be final. A finding that a teacher was dismissed without cause shall not reinstate his or her contract unless reinstatement is ordered by the board of education."

Title 70, Oklahoma Statutes, § 1-116:

"Except as otherwise provided herein, the following positions in school districts shall have the meanings indicated:

1. Teacher: Any person who is employed to serve as district superintendent; county superintendent, principal, supervisor, counselor, librarian, school nurse or classroom teacher, or in any other instructional, supervisory, or administrative capacity, is defined as a teacher."

STATEMENT OF THE CASE

On February 5, 1973, the Board of Education of Independent School District 20 of Muskogee County, Oklahoma met and inducted its newly elected member James K. Mayes.[1] At this meeting on the motion of board member Wade, seconded by Mayes, it was decided that the Superintendent of School Jon Tom Staton be dismissed and written notice of the *proposed* dismissal be given him by the President of the Board of Education, because of willful neglect of duty and incompetency. By letter dated February 6, 1973, the Board notified the Superintendent that the proposed

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[1] Petitioner Mayes was elected to the five member board after an election froth with criticism of the policies of the Superintendent of Schools, the Superintendent and the administration of the school system in Muskogee County, Oklahoma.

dismissal was predicated on charges of willful neglect of duty and incompetency as provided in the Oklahoma Statute. 70 Oklahoma Statutes §6-103. The notice further advised, in accord with the statutory provision, that a hearing on the proposed dismissal would be held on February 19, 1973 and he was entitled to be represented by counsel. At the time and place designated in the notice Superintendent Staton appeared with counsel and some twelve witnesses. At the opening of the hearing counsel for the Superintendent made objections that (1) the notice given was inadequate as to the charges against the Superintendent and (2) the tribunal was biased against his client. The objections were duly noted in the record and denied. The hearing then proceeded to the taking of testimony from witnesses which spanned some eight (8) hours of hearing on February 19 and 20. On February 22, 1973 the School Board by a vote of 3 to 1, with one member absent, voted to dismiss the Superintendent on the grounds set forth in the notice, that is willful neglect of duties and incompetence.[2] Superintendent Staton thereafter filed an action in the United States District Court for the Eastern District of Oklahoma alleging his dismissal deprived him of due process. The action was at first filed pursuant to 42 U.S.C. §1983, but subsequent to a motion to dismiss, the complaint was amended to allege jurisdiction under 28 U.S.C. §1331. The relief sought by the Superintendent was reinstatement for the balance of the contractual period (to

[2] Members Mayes, Wade and Moody voted for the Superintendent's dismissal. It is interesting to note that the old board fearful that Mayes would be elected and join Wade and Moody to form a new majority broke with customary practice and voted to renew the Superintendent's contract rather than permitting the new board to act in the matter.

June 30, 1974), expungement from the minutes of all reference to his being incompetent or willfully negligent in the performance of his duties, damages for lost wages and punitive damages in an unspecified amount and attorney's fees and costs. The case was tried to the Court without jury on only two grounds (1) inadequacy of notice and (2) dismissal was accomplished by a biased tribunal. At the trial witnesses were called, among them the Petitioners, and the record of the dismissal proceedings before the Board was placed in evidence. Inquiry was made into the dismissal, the grounds for dismissal and basis for the alleged bias of the members of the School Board who voted for dismissal. The Superintendent presented evidence which showed that Moody and Wade had during their tenure voted not to renew the Superintendent's contract. Evidence was also offered to show that Mayes in his campaign opposed the Superintendent and if successful would vote not to renew the contract. The District Court in its Memorandum Opinion found that (1) notice was adequate and met the minimal requirements of due process and (2) that the defendants each testified that they voted to dismiss the Superintendent based upon the evidence presented at the hearing and after reaching a conclusion from the evidence presented at the hearing.

The District Court recognized in its decision the fact that the Board of Education as created by statute was duly empowered to conduct the hearing. It was the only body so constituted and there was no statutory procedure for disqualification, an alternative tribunal or review. The decision of the Board was final and unappealable. Acknowledging the "Rule of Necessity" in *Brinkley* v. *Hassig*, 83 F.2d 351 (10th Cir.

1936) citing *Evans* v. *Gore*, 254 U.S. 245, the Court found no actual bias. According to the lower court due process is satisfied if the procedures are reasonably calculated to be fair and lead to reliable determinations of factual issues involved. The District Court recognized that the School Board was charged by law with governing the affairs of the school District (See Appendix B, pp. 34a to 36a) and its decision was not to be lightly set aside. Moreover while not obliged to examine the record, the District Court noted (as well it could in view of the testimony of 24 witnesses)

> "[T]he transcript of the hearings of February 19 and 20, 1973 does reveal evidence of shortcomings of the Plaintiff which could amount to a willful neglect of duty and incompetence in the judgment and discretion of the Board." (Appendix B, p. 28a).

The District Court concluded that

> "Plaintiff has *failed to establish he was denied procedural due process in connection with his dismissal under a procedure and tribunal established by the Oklahoma Legislature* and all the circumstances involved herein." (Appendix B at p. ——) (Emphasis supplied)

The Tenth Circuit Court of Appeals determined (1) that the notice was adequate and met due process requirements and (2) under Fourteenth Amendment due process principles the adverse determination on charges against Dr. Staton is invalid. Accordingly it vacated the judgment of the trial court and remanded with instructions that the charges be expunged. (Appendix A at p. 14a)

The Court of Appeals then stated that

> "the Board of the defendant District may then consider if it wishes, making a new finding on charges to determine whether the earlier removal was proper."[3]

The Tenth Circuit determined that in view of the prior actions[4] of three members of the tribunal, the Superintendent was deprived of a fair hearing guaranteed by the Fourteenth Amendment. *In re Murchison*, 349 U.S. 133.

REASONS FOR GRANTNIG THE WRIT

a) Application of the Rule of Necessity

The provisions of 70 Oklahoma Statutes § 6-103 in effect in 1973 established the procedures for the dismissal of teachers and district superintendents. The statute establishes the Board of Education as the only tribunal before whom charges can be raised. The statutory procedure contains no provisions for disqualification of Board members or the establishment of an alternative tribunal. The decision of the Board in 1973 was final and unappealable. The above procedure was the statutory mechanism established by the State Legislature. The procedure was predicated on a funda-

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[3] It should be noted that in 1975 the Oklahoma legislature amended the statute in question to provide appeal remedies after a board decision. See 70 Oklahoma Statutes Supp. 1975 § 6-103. The Court stated "Thus means *are now* available for an equitable solution protecting the right to a fair hearing." (See Appendix A p. 13a.)

[4] The actions of the three school board members constitute the exercise of their rights of free speech and effectuation of the wishes of their constituency in their voting against renewal of Dr. Staton's contract.

mentally sound principle that members of the School Board are the elected representatives of the local school district; they are in a position to have dealings with their school personnel and are in the best position to pass on the competence and activities of such personnel prior to the conduct of a hearing. Indeed this Court in its decisions has acknowledged the commitment in our Nation of public education to the control of state and local authorities *Goss* v. *Lopez,* 419 U.S. 565; *Epperson* v. *Arkansas,* 393 U.S. 97.

In the case here presented, the Superintendent of school alleges that he was denied a fair hearing because members of the School Board by virtue of their prior voting record against renewal of his contract and the public statements made during an election campaign of Board Member Mayes were so biased as to be unable to render a decision based on the evidence elicited at a hearing. The Court of Appeals decision sustains that view. In so doing the appellate court pays only lip service to its own prior decision in *Brinkley* v. *Hassig,* 83 F.2d 251 (10th Cir. 1936). The Court in *Brinkley* stated:

> From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. If the law provides for a substitution of personnel on a board or court, or if another tribunal exists to which resort may be had, a disqualified member may not act. But where no such provision is made, the law cannot be nullified or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal. In *Evans* v. *Gore,* 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887, 11 A. LR. 519 a question arose in which members of the court had a direct financial interest. Adverting to this regretful circumstance, the court declined to renounce the jurisdiction which appellant was entitled to invoke since "There was no other appellate tribunal to which under the law he could go."
>
> Findings of administrative tribunals, . . . cannot be overturned . . . as long as it [the result] is reached from a consideration of substantial evidence produced at the hearing. Id. at 357-358

The Court of Appeals in the instant case asserts that because the Board initiated the proposed dismissal and the three instigating members were opposed to the Superintendent, there could be no fair hearing *per se.* This attitude is contrary to the decisions of this Court in countless cases. Compare *Cafeteria and Restaurant Workers* v. *McElroy,* 367 U.S. 886. The Tenth Circuit presumes in its decision that the members of the board are incapable of judging this particular controversy fairly on its merits, despite their testimony to the contrary. This Court has said a decision maker is not to be disqualified for the following reasons: (1) familiarity with the facts gained by an agency in performance of its statutory role, *Withrow* v. *Larkin,* 421 U.S. 35; (2) because he has taken a position, *even in public on a policy issue* related to a dispute, *United States* v. *Morgan,* 313 U.S. 409. There are many federal agencies who operate as investigators, chargers, prosecutors and triers. Due process is nonetheless maintained. *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683; *Kennecott Copper Corporation* v. *F.T.C.,* 467 F.2d 67 (10th Cir. 1972). Similar allegations of bias have been raised in other education cases and other circuit courts have recognized:

> ". . . While it is desirable that an administrative hearing be clothed 'not only with every element

of fairness but with the very appearance of complete fairness,' Amos Treat & Co. v. SEC, 113 U.S. App.D.C. 100, 306 F. 2d 260, 267 (1962), we would not mandate individual disqualifications in the circumstances of this case. School boards frequently negotiate with teachers in their capacity as bargaining representative. The constitutional rule sought here would require that decisions as to teacher competence be surrendered to a body less familiar with relevant considerations and not responsible under state and local law for making these decisions. Moreover, it is unrealistic to require a Connecticut town to provide more than one body to deal with various aspects of school administration. We do not believe that due process, varying as it does with differing factual contexts, requires so much in this case, absent a showing of actual, rather than potential, bias." *Simard* v. *Board of Education of Town of Groton,* 473 F.2d 988, 993 (2d Cir. 1973) See also *Swab* v. *Cedar Rapids Community School District;* 494 F.2d 353 (8th Cir. 1974)

Indeed, if the Tenth Circuit were correct in its application of the law, the Superintendent could never be dismissed by a board in which any member had taken a position in opposition to him or had made public speeches against his policies. To assert this proposition is to recognize the total frustration of the elective and political process.

In the case here presented there was no personal bitterness, no conflict of interest, and no pecuniary interest in the action taken by the Board. The action was taken in the exercise of its governmental function in response to the mandate of the constituency which had elected the members to the Board. Compare *Taylor* v. *Hayes,* 418 U.S. 488.

b) The Decision Is In Conflict With This Court's Decision in Hortonville Joint School District No. 1 v. Hortonville Education Association, — U.S. —, 96 S. Ct. 2308

The Oklahoma statute vests the Board of Education with the power to discharge employees, be they teachers or superintendents, after notice and a hearing. 70 Oklahoma Statutes §6-103. The State law in Oklahoma, as in the law of Wisconsin discussed in the *Hortonville* case, vests the governmental policy making function exclusively in the school board. In its decision in *Hortonville,* this Court rebuked the Wisconsin Supreme Court for attempting to fashion a remedy giving deference to federal due process requirements which action was appropriately left to the state legislature. Here the Tenth Circuit has similarly tried to fashion a remedy under the guise of federal due process requirements. In 1975 the Oklahoma legislature provided for review of a board decision. 70 Oklahoma Statute 1975 Supp. §6-103. This statute is now to be given retroactive effect by the appellate court under the appellation of due process. The Tenth Circuit has engaged in an exercise contrary to the instruction of this Court. This Court in the exercise of its supervisory powers must clearly delineate the permissible areas of interposition and define due process restraints. The federal courts should not become the forum to relitigate or to correct the errors in the exercise of school officials' discretion. *Wood* v. *Strickland,* —— U.S. ——, 95 S.Ct. 992. As this Court has stated federal courts must guard against altering the statutory powers of a state created board as a matter of federal due process. The Court must determine whether the statutory procedures provide adequate due process guarantees.

c) This case presents a significant federal question affecting statutes and decisions of the highest courts of other states.

In the dissenting opinion of Judge Barrett, it is noted that the statutes of the states of Wyoming and New Mexico are similar to that of Oklahoma. Both statutory arrangements (N.M.S., 1953, Anno., 1975 Supp., §§ 77-8-12 through 77-8-17; Wyoming Statutes, 1957, 1975 Cum. Supp., Vol. 6, §§ 21.1-151 through 21.1-164) provide for hearings before the school board, with procedural and substantive due process requirements equal to those prescribed under the model Administrative Procedure Act, with full review accorded. The Supreme Courts of both states have held that there is no deprivation of due process, *per se,* resulting from dismissal proceedings conducted by the very board which through one or more of its members or an agent has (a) given notice of the determination to dismiss before the hearing and (b) submitted a statement of "cause" if a hearing should be requested by the teacher, and thereafter heard and decided the issues presented. Upon a required complete record of the proceedings, the appellate courts examine to determine whether there is substantial evidence in support of the board's findings and conclusions. If the courts determine that the board acted arbitrarily, capriciously or unreasonably, the decision is set aside. *See: Monahan* v. *Board of Trustees,* etc., County of Fremont, 486 P.2d 235 (Wyo. 1971); *Wickersham* v. *New Mexico State Board of Education,* 81 N.M. 188, 464 P.2d 918 (1970).

The decision of the Tenth Circuit has implications beyond this immediate case and requires that this Court review the decision for the benefit on these state courts and other state courts which may be called upon to interpret like statutes.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75-1332

JON TOM STATON, *Plaintiff-Appellant,*

v.

JAMES K. MAYES; MOODY WADE; MIKE MOORE; and INDEPENDENT SCHOOL DISTRICT NUMBER 20 OF MUSKOGEE COUNTY, OKLAHOMA, *Defendants-Appellees.*

Appeal from the United States District Court for the Eastern District of Oklahoma (D.C. No. 73-112)

(Filed February 15, 19—)

Kay Wilson, Jr., Attorney, Muskogee, Oklahoma, for Plaintiff-Appellant.

Andrew Wilcoxen, Muskogee, Oklahoma (Bruce Green, Pearson & Green, Muskogee, Oklahoma, on the brief) for Defendants-Appellees.

Before HOLLOWAY, BARRETT and DOYLE, Circuit Judges

HOLLOWAY, Circuit Judge

This civil rights suit challenges the dismissal of plaintiff, Dr. Staton, as superintendent of Independent School District No. 20 of Muskogee County, Oklahoma, which is named a defendant. Defendants Mayes, Wade and Moore

were three members of the five-member board who caused the dismissal in February, 1973, following a hearing on charges of willful neglect of duty and incompetence. In April, 1973, this suit was brought alleging denial of due process and seeking reinstatement, expungement of the board's action, damages and other relief. After an evidentiary hearing the trial court rejected the constitutional claims and dismissed the action, and this appeal followed.

For some time before the dismissal, defendant Moore had voted against renewing plaintiff's contract. Defendant Wade had also voted once not to renew. However, they were outvoted and plaintiff had been continued as superintendent. Shortly before a school board election in January 1973, a board majority voted for a renewal again and a contract with plaintiff extending to June 30, 1974, was approved.

In his election campaign defendant Mayes stated he would vote for a change in superintendent. He was elected and then took office on February 5, 1973, when the board met and organized. At that same meeting, the board voted a proposed dismissal of plaintiff. A letter was sent to Dr. Staton the next day notifying him of the proposed dismissal on grounds of willful neglect of duty and incompetence, and of a hearing scheduled on February 19.[1]

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[1] The letter stated:

February 6, 1973
Muskogee, Oklahoma

Dr. Jon Tom Staton
4301 West Broadway
Muskogee, Oklahoma 74401

Dear Dr. Staton:

The Muskogee School Board of District I-20 has voted to dismiss you as Superintendent of Schools for said District.

Please be advised that this is a notice of the proposed dismissal and that the charges against you are willful neglect of duty and incompetency. These charges are brought by this School Board.

Dr. Staton appeared at the hearing with counsel and 12 witnesses. After the first witness called by the board to support the charges was sworn, but before he began to testify, plaintiff's attorney objected to the introduction of any testimony, challenging the proceedings on several grounds.[2] The board heard the objections but went forward with the hearing, which Dr. Staton had transcribed.[3]

The hearing was conducted on the evenings of February 19 and 20. On February 22 at a third session, defendants Mayes, Moore and Wade voted to dismiss Dr. Staton effective March 15, with suspension of all his authority to

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Please further be advised that a hearing on the proposed dismissal shall be held at the Education Center, 570 North 6th Street, Muskogee, Oklahoma on February 19, 1973, at 7:30 P.M.

Please be further advised that you are entitled to be present and represented by counsel at said hearing.

Yours very truly,

(signed)

Mike Moore
President of the Muskogee
School Board, District I-20

[2] Plaintiff's counsel objected that: (1) the superintendent was dismissed prior to the hearing, contrary to the Oklahoma statutes; (2) the notice failed to state who brought the charges; (3) the charges fail to state what the acts constituting alleged incompetence or willful neglect of duty were, or when committed, failing to apprise of matters necessary for defense; (4) not all the board was present (one member was absent); (5) there was a denial of due process; (6) the board was exceeding its jurisdiction to hold a hearing, not having served the teacher with a statement of charges or an identification of accusers; and (7) the board was biased and there was no procedure to challenge that bias.

[3] The transcript is part of our record, Plaintiff's Ex. 17, now R. IV.

continue until that date. Board member Matthews voted not to dismiss plaintiff and Mrs. Chandler was absent. The board's action was reflected as a part of its minutes.[4] There were not further written or oral statements of findings on the dismissal.

Although several grounds were alleged as the basis of the civil rights complaint, the court trial was confined to two issues, adequacy of notice of the hearing and alleged bias by the board. The trial court's memorandum opinion found against plaintiff on both grounds and dismissed. On appeal plaintiff makes these principal arguments, claiming denial of procedural due process: (1) the notice gave no specifics of the acts or deficiencies considered to amount to willful neglect of duty or incompetence, nor any of the adverse witnesses; and (2) the board majority causing the dismissal had made public statements or private commitments against plaintiff, showing a biased tribunal. Plaintiff argues that the adverse testimony established no incompetence or willful neglect of duty and that it dealt only with vague terms such as "disharmony." He says that any "disharmony" was only reaction to an integration system, a teacher evaluation program and an annexation plan, all of which the board had ordered Dr. Staton to implement. Plaintiff also argues there were no findings by the board after its hearing and no adequate findings by the trial court on the issues before it. (Brief of Appellant, 15-16, 21, 30, 37).

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[4] The minutes stated (R. III, 203):

3. *Dismissal of Dr. Jon Tom Staton*

IT WAS MOVED by Mr. Mayes and seconded by Mr. Wade THAT DR. JON TOM STATON BE DISMISSED, HIS DISMISSAL TO BE EFFECTIVE MARCH 15, 1973, THE FIRST TWO WEEKS IN MARCH TO BE CONSIDERED THE USUAL VACATION AND THAT THE SUSPENSION OF ALL RESPONSIBILITIES AND AUTHORITY CONTINUE UNTIL SUCH DATE.

Vote: Yes—Mayes, Wade, Moore. No—Matthews. The motion was declared carried by a three to one vote.

THE RIGHT TO PROCEDURAL DUE PROCESS

As the predicate for his procedural due process claim, plaintiff argues that he had a property interest by virtue of his contracts that had been renewed to extend to June 30 1974, at $25,000 per year, with 1 5/12 years remaining (Brief of Appellant, 15). And he asserts that he had a deprivation of liberty and property by the stigma of being branded incompetent and guilty of willful neglect of duty.

We must agree with both contentions.[5] Plaintiff had a legitimate claim of entitlement to his position derived from his contracts. Board of Regents v. Roth, 408 U.S. 564, 577. Moreover, this was a proposed dismissal of a professional officer by a public body for willful neglect of duty and incompetence. These charges were made publicly and might seriously damage plaintiff's standing and associations in his community and affect his good name and reputation.[6] See id. at 573; Wellner v. Minnesota State Junior College Board, 487 F.2d 153, 155-56 (8th Cir.); Huntley v. Community School Board of Brooklyn, 543 F.2d 979, 985 (2d Cir.). Dismissal on such grounds would likely have serious effect on his ability to take advantage of other employment,[7]

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[5] We do not understand the defendants' arguments to deny that "property" and "liberty" interests were involved.

[6] The February 5 meeting where it was decided that notice of the proposed dismissal should be given for willful neglect of duty and incompetency was a regular meeting attended by representatives of the news media and a room full of guests (see Minutes, R. III, 210). The hearings on February 19 and 20 were also open meetings, with numerous witnesses present to testify. And the February 22 meeting where the decision was made to dismiss plaintiff was also attended by representatives of the news media and guests (see Minutes, R. III, 203). Thus the circumstances were unlike the private communication of reasons for dismissal in Bishop v. Wood ,—— U.S. ——, 96 S.Ct. 2074, 2079.

[7] There was uncontradicted expert testimony at trial as to the adverse effect on a school official's career of a dismissal based on such charges (R. I, 87-91).

see Powers v. Mancos School District, 539 F.2d 38, 43 (10th Cir.), there being no mere private communication of the grounds for discharge as in Bishop v. Wood, —— U.S. ——, 96 S. Ct. 2074, 2079.

We are convinced that the procedural due process guarantee applied to insure the plaintiff fundamentally fair procedures in connection with these proceedings concerning his proposed discharge.

ADEQUACY OF THE NOTICE

Plaintiff argues that the mere notice of charges of incompetence and willful neglect of duty, without specificity as to acts or deficiencies alleged, and without naming adverse witnesses, amounted to a denial of due process (Brief of Appellant, 15, 28).

At a minimum, the Due Process Clause of the Fourteenth Amendment required notice and an opportunity for hearing appropriate to the nature of the case before deprivation of the liberty or property interests of plaintiff which have been identified. See *Roth*, supra at 573, 576 n. 15; Goss v. Lopez, 419 U.S. 565, 579, 581. These basic requirements must be determined with consideration of both the nature of the state function involved as well as of the private interests affected by the governmental action. Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 895. And in connection with possible judicial interposition in cases like this, we must be mindful of the commitment in our Nation of public education to the control of state and local authorities. Goss v. Lopez, supra at 578.

The trial court rejected the argument on lack of adequate notice, pointing to the use in the letter of the statutory terms of grounds for dismissal, to the plaintiff's failure to ask for a bill of particulars or a more definite notice, and to plaintiff's apparent realization of what was involved as

shown by his preparedness to meet the charges at the hearing.

It is true that the charges of incompetency and willful neglect of duty were grounds of removal provided in 70 O.S.A. § 6-103.[8] However we cannot agree that this, without more, shows meaningful notice of what one must be prepared to meet. We do agree that the lack of any objection to the notice letter and the absence of any request for a more definite statement of the charges are significant. There was a reasonable time interval of 13 days between mailing the notice and the hearing itself. Not until the first witness at the hearing was called was any objection made to adequacy of the notice.

Plaintiff objects to the trial court's reasoning, citing Dunham v. Crosby, 435 F.2d 1177 (1st Cir.), which did reject a similar argument on lack of request for a hearing. The First Circuit held there that a teacher was not barred from asserting a due process claim of lack of a hearing by failure to request a hearing. We have no disagreement with the reasoning there applied.

We feel that here, however, since *some* notice was given to the plaintiff a reasonable time ahead of the scheduled hearing, an objection to the sufficiency of the notice not made until commencement of the hearing came too late. In fact, since his counsel made the objection quite fully and formally as the testimony started, with no request for a continuance, it is difficult for plaintiff to argue against a ruling of a knowing waiver. Particulars of asserted grounds for dismissal have been furnished in similar cases, *e.g.*,

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[8] While no pendent claim of any failure to meet State notice requirements is asserted, we note that the Oklahoma Court has enforced a state statutory requirement of notice containing a statement of causes related to a legal cause for dismissal, before a hearing. See Lovelace v. Ingram, 518 P.2d 1102 (Okla.). Of course, in addition to state requirements, federal due process minimum standards must be observed.

Simard v. Board of Education of Town of Groton, 473 F.2d 988, 991 n. 5 (2d Cir.); Blunt v. Marion County School Board, 515 F.2d 951, 954 (5th Cir.), and in the circumstances before us, we feel that the belated claim of insufficiency of the notice does not demonstrate a denial of due process. Cf. Grimes v. Nottoway County School Board, 462 F.2d 650, 653 (4th Cir.). Moreover, there is no persuasive showing that the defense was impeded by lack of further details. Simard v. Board of Education of Town of Groton, supra at 994.

In sum, we cannot sustain the claim that there was a defective notice which amounted to a denial of due process.

The Claim of a Biased Tribunal

Plaintiff's most substantial claim of denial of procedural due process is that the board was a biased tribunal. The point requires examination of the background and of the system of school administration involved.

The board is an elective body under Oklahoma law. 70 O.S.A. § 5-107A. At the time this dispute arose the board was the only body empowered to dismiss a superintendent for willful neglect of duty or incompetency.[10] In cases involving these grounds for removal, the board's decision at the hearing was final. 70 O.S.A. § 6-103.[11] No provision was made for a hearing by an alternative tribunal or for disqualification of board members on a challenge of bias or prejudice.

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[10] As noted in discussing our disposition, this procedure is now changed and certain appropriate bodies may now make the final decision on removal after a board meeting.

[11] 70 O.S.A. § 6-103 affords procedures for the removal of teachers. However § 70 O.S.A. § 1-116 provides that the definition of a "teacher" includes superintendents generally for purposes of the Oklahoma school code.

At the opening of the hearing on the proposed dismissal of Dr. Staton, several objections to the proceeding going forward were made. One objection was "to the bias of the board and no procedure to challenge that bias and constituting deprivation of due process." (R. IV, 9).

We start with a fundamental constitutional principle: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." In Re Murchison, 349 U.S. 133, 136; see also Goldberg v. Kelly, 397 U.S. 254, 271; Wong Yang Sung v. McGrath, 339 U.S. 33, 45-46, 50. Due process itself however, is a term that "negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers v. McElroy, 367 U.S. 886, 895. In a recent similar case the Supreme Court stated that "[d]etermining what process is due in a given setting requires the Court to take into account the individual's stake in the decision at issue as well as the State's interest in a particular procedure for making it." Hortonville Joint School District v. Hortonville Education Association, —— U.S. ——, 96. S.Ct. 2308, 2315.

There is an obvious interest of the State in the particular procedure provided for removal of school personnel. As the trial court observed, there is a system of administration by an elective board which governs the affairs of the school district and employs and dismisses superintendents and teachers. And as in the *Hortonville* case, when the hearing was held the board was the only body empowered to employ and dismiss. In such a case we have said that out of necessity, disqualification will not be permitted to destroy the only tribunal with power to act. See Brinkley v. Hassig, 83 F.2d 351, 357 (10th Cir.).

On the other hand, an individual like the plaintiff has a profound interest in the fairness of the hearing tribunal whose decision may jeopardize his property interest in his position and his liberty interest of standing and reputation

in his profession. See Board of Regents v. Roth, 408 U.S. 564, 573, 577. In connection with the fairness and the appearance of fairness of the board, we must weigh these circumstances.

During the month before the hearing, defendant Mayes made public statements in his campaign for election to the board concerning Dr. Staton. In newspaper advertising Mayes stated that defendants Moore and Wade had publicly said that no progress could be made with school problems until there was a new superintendent, that he, Mayes, was pledged to seek a new top level administration for the schools, that from discussions with parents, teachers and citizens it had become apparent to him that the trouble lay with the superintendent, and that he would vote to make the necessary change. (See Plaintiff's Exhibits 12, 13 and 14 in the appendix to this opinion). Mayes testified at trial, however, that he had not committed himself before hearing the evidence to vote for plaintiff's dismissal and felt the decision had to be based on the evidence at the hearing. (R. I, 98-99). It was Mayes who moved for the dismissal, the motion carrying by the votes of Mayes, Moore and Wade. (See note 4, supra).

The other defendants testified at trial also. Moore said he listened to the evidence at the hearing and required proof to be there and based his decision on the evidence he heard at the hearing. He admitted going to visit with a board member, Mrs. Chandler, and saying there was a possibility plaintiff would be leaving and if they could "be together on the board and not disrupt the board, where we could continue to have school for children, it would be best for all of us." (Id at 102-03).

Defendant Wade testified that he based his decision on disruption between the principal, the teachers and the community and felt that plaintiff was the prime cause after he had heard all the evidence, and based his decision on that. He said he had not been committed to terminate plaintiff before hearing the evidence. He admitted saying to Mrs. Chandler in late 1972, after another hearing in Oklahoma City, that Dr. Staton "has got to go." (Id. at 106-07).

The firm public statements before the hearing by defendant Mayes for the removal of Dr. Staton, and the discussions by defendants Moore and Wade as admitted, reveal a tribunal ~~not meeting~~ the demands of due process for a hearing with fairness and the appearance of fairness. Cinderella Career and Finishing Schools, Inc. v. F.T.C., 42 F.2d 583, 590-92 (D.C.Cir.); Texaco, Inc. v. F.T.C., 336 F.2d 754, 759-60 (D.C.Cir.). These were not mere statements on a policy issue related to the dispute, leaving the decision maker capable of judging a particular controversy fairly on the basis of its own circumstances. *Hortonville,* supra, —— U.S. ——, 96 S.Ct. at 2314. Nor was this simply a case of the instigation of charges and a statement of them during an investigatory phase by the copy that will later decide the merits of the charges. *E.g.,* Withrow v. Larkin, 421 U.S. 35, 52-55; and see Kennecott Copper Corp. v. F.T.C., 467 F.2d 67, 79-80 (10th Cir.).

Instead this case involves statements on the merits by those who must make factual determinations on contested fact issues of alleged incompetence and willful neglect of duty, where the fact finding is critical. Cinderella Career and Finishing Schools, Inc. v. F.T.C., 425 F.2d 583, 590-92 (D.C. Cir.). The hearing involved the possibility of an erroneous and unfair factual decision which was absent in *Hortonville,* where the basic facts were admitted. See 96 S.Ct. at 2315. And the ruling here concerned factual decisions on alleged incompetence and willful neglect of duty—issues which were both hotly contested and of critical effect on the liberty and property interests of the plaintiff.[12]

[12] We have noted the statement in the trial court's memorandum opinion that the record of the board hearing reveals evidence of shortcomings of the plaintiff which could amount to a willful neglect of duty and incompetence in the judgment and discretion of the board.

We are mindful of the reference in the trial court's opinion to the testimony by each defendant that they voted to dismiss plaintiff based on the evidence presented at the hearing, and that the plaintiff had failed to establish that he was denied procedural due process. While the defendants testified that they required proof at the hearing and decided on the basis of the proof, the evidence is uncontradicted on the making of several public statements by defendant Mayes for the removal of plaintiff, and of unfavorable discussions by Moore and Wade as well. We are convinced that these established circumstances left no room for a determination that there was a decision by a fair tribunal, with the appearance of fairness, in view of the totality of these circumstances. Cinderella Career and Finishing Schools, Inc. v. F.T.C., 425 F.2d 583, 590-92 (D.C.Cir.) (due process not afforded in view of a prior public statement by *one* commission member);[13] see In Re Murchison, 349 U.S. 133, 139; Texaco, Inc. v. F.T.C., 336 F.2d 754, 759-60 (D.C.Cir.); Perlman v. Shasta Joint Junior College District Board of Trustees, 88 Cal. Rptr. 563, 570 (Ct. App., 3d Dist.); and see Goldberg v. Kelly, 397 U.S. 254, 271. On the record as a whole we are left with the firm conviction that this board decision cannot stand and that a mistake was

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Due to the infirmity we find in the board's decision in the case, we need not decide whether the record supports the board action. It sufficies to note that the record shows no admitted set of facts concerning plaintiff as were present in *Hontonville*. The proof presented serious fact problems.

[13] There was undisputed proof of earlier statements by three Board members that Dr. Staton should be removed. In addition to that of defendant Mayes and his reference to earlier public statements by defendants Moore and Wade (see Appendix), there was proof of such statements during campaigns by defendants Moore and Wade in the record of the Board hearing by testimony of a former Board member. (See Hearing Transcript, p. 342, which was made plaintiff's Ex. 17, and defendants' Ex. 1). The proof of these statements by the three Board members was not disputed.

made in the ruling denying the due process claim. Zenith Corp. v. Hazeltine, 395 U.S. 100, 123.

We do not say that such statements in an election campaign or between members were unlawful or improper. However, a due process principle is bent too far when such persons are then called on to sit as fact finders and to make a decision affecting the property interests and liberty interests of one's reputation and standing in his profession. See Board of Regents v. Roth, 408 U.S. 64,569. When the constitutional guarantee of an impartial and fair hearing is invoked at that stage, the due process considerations must prevail. See In Re Murchison, 349 U.S. 133, 136.

We are also mindful of the fact that disqualification or an alternate tribunal were not provided for at the time of the board hearing. We realize that both the board and the trial court faced this problem. There was also the rule of necessity to consider, a rule applied in some circumstance to permit tribunals to proceed, despite disqualification problems. See Brinkley v. Hassig, supra, 83 F.2d at 357. However, the Oklahoma legislature has now provided appeal remedies after a board decision, with a full hearing and review on the facts by the Professional Practices Commission and further appeal to the State Board of Education. See 70 O.S. Supp. 1975, § 6-103. Thus means are now available for an equitable solution protecting the right to a fair hearing.

After our disposition which will require setting aside the prior board decision, if the board should determine that it should proceed with removal procedures against the plaintiff, and a new removal decision is entered, the appeal remedies can be used for a full review on the facts and a decision by other tribunals, if a challenge is made to the fairness of the tribunal and the new decision. Cf. Gonzales v. Automatic Employees Credit Union, 419 U.S. 90, 101; Wilson v. City of Port Lavaca, 391 U.S. 352. We feel this disposition proper and necessary to respect the constitutional guarantee of a fair hearing.

Conclusion and Disposition

Only one issue requires further discussion. This is the claim by plaintiff that the failure of the board to make findings after the hearing amounted to a denial of due process (Brief of Appellant, 30). While the issue was not urged in the trial court, it may be of importance in further proceedings and it has due process implications justifying our consideration on the merits. Gomes v. Williams, 420 F.2d 1364, 1367 (10th Cir.).

After the hearing, the board's decision was resolved by a minute that merely noted plaintiff's removal on motion by defendant Mayes, with defendants Mayes, Wade and Moore voting for removal. (Plaintiff's Ex. 4). Assuming that such action did imply a finding that the removal was based on the general charges of incompetence and willful neglect of duty in the notice of the proposed removal, such conclusory terms were not sufficient to sustain the action under due process principles. While there need be no full opinion or even formal findings of fact and conclusions of law, the decision maker should state the reasons for the determination and the evidentiary basis relied on. See Goldberg v. Kelly, 397 U.S. 254, 271; Kinsella v. Board of Education, 378 F.Supp. 54, 60 (W.D.N.Y.). Such rudimentary statements of reasons are a safeguard against a decision on ex parte evidence. We must agree that those fundamental elements were lacking here, and this has compounded the difficulty of the case. A statement of reasons and a fair indication of the evidentiary basis relied on should be given in such a decision.

For reasons stated earlier, under Fourteenth Amendment due process principles we must hold that the adverse determination on the charges against Dr. Staton is invalid. Accordingly, we vacate the judgment of the trial court and remand with directions that the former determination on the charges be declared invalid and that it should be expunged.

The Board of the defendant District may then consider, if it wishes, making a new finding on the charges to determine whether the earlier removal on them was proper. If a new decision on the charges is entered by the Board and challenges to it are made, disposition by the trial court will be withheld to permit completion of any State appeal or review proceedings. On conclusion of such proceedings, the trial court may then consider whether equitable or compensatory relief may be proper.[12]

[12] We have noted that the contracts between the board and the plaintiff have expired, and hence a reinstatement order would be inappropriate. After any further hearings which may be held by the administrative boards to determine whether the earlier ruling against the plaintiff was proper, the trial court may consider whether any other relief is appropriate.

Appendix

Plaintiff's exhibit 12 is a copy of a campaign statement of defendant Mayes appearing in a Muskogee newspaper on January 22, 1973. In pertinent part the statement read:

> Mike Moore and Moody Wade: The only members of the present school board with children in school have stated publicly that no progress can be made with our school problems until we get a new superintendent.
>
> Jim Mayes:
>
> The candidate with a child in school, is pledged to seek a new top level administration for our schools. With 2 members of a 5 member board who already feel the same way, a new superintendent is now possible.

Plaintiff's exhibit 13 is a campaign statement of defendant Mayes appearing in a Muskogee newspaper on January 17, 1973, which stated in part:

> The only thing you as a Muskogee citizen can do now is to vote for the one candidate for the board of education who pledges to get a sound curriculum for the students and teachers, and to get rid of an unsound administration for Muskogee.

Appendix

Plaintiff's exhibit 14 was a campaign statement of defendant Mayes appearing on January 23, 1973 in a Muskogee newspaper, which stated in part:

> From Discussions With Parents, Teachers, and Concerned Citizens During the Course of the Campaign It Has Become Apparent to Me That the Trouble Within the Muskogee School System Lies With the Present Superintendent and That Progress for Education Is Impossible Unless a Change Is Made. If Elected I Will Vote To Make the Necessary Change.
>
> Signed
>
> James K. Mayes, Jr.

No. 75-1332—Jon Tom Staton v. James K. Mayes; Moody Wade; Mike Moore; and Independent School District No. 20 of Muskogee County, Oklahoma.

Barrett, Circuit Judge, dissenting:

I respectfully dissent.

The majority opinion recognizes that at the time the hearing was held before the five member school board, Oklahoma law had no provision for a dismissal proceeding before any other body or tribunal. In Brinkley v. Hassig, 83 F.2d 351 (10th Cir. 1936) we recognized and adopted the so-called "rule of necessity." We there said:

> . . . *some of the board [members] had expressed such prejudice, and doubtless all were in fact prejudiced.* . . . From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. . . . Findings of administrative tribunals . . . cannot be overturned . . . *as long as it [the result] is reached*

from a consideration of substantial evidence produced at the hearing. . . . (Emphasis supplied.)

83 F.2d, at pp. 356-358.

I would apply the rule laid down in *Brinkley* in the case before us. We noted in *Brinkley* that such administrative tribunals as the FTC, the ICC and state Public Service Commissions investigate, file complaints, conduct the hearings on charges preferred and decide the ultimate issues in controversy. We did not find prejudice *per se* which, in my judgment, is the effect of the majority opinion in this case. Such prejudice and bias has been determined notwithstanding that the three challenged board members, Mayes, Moore and Wade, testified before the district court that their public statements and campaign material critical of Superintendent Staton aimed at his removal from the school system *did not* prejudice them in the decisional process at or following the hearing. Furthermore, the district court found a lack of prejudice following an evidentiary hearing.

The "rule of necessity" has been invoked in many cases similar to that presented here. These cases stand for the proposition that the type of bias or prejudice attributed to the three board members in this case is not such as to disqualify them from hearing the matter. *See* Evans v. Gore, 253 U.S. 245 (1920), where the validity of taxing income of judges was heard in that there was no other appellate tribunal available; Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948); Loughran v. Federal Trade Commission, 143 F.2d 431 (8th Cir. 1944); State ex rel. Burns v. City of Livingston, 144 Mont. 248, 395 F.2d 971 (1964).

The majority opinion cites to the recent *Hortonville* decision rendered by the Supreme Court. Significantly, the Court, in reversing, while not directly discussing the Wisconsin Supreme Court's decision to "fashion" a remedy involving alleged bias and prejudice on the part of school

board members in a hearing involving dismissal of teachers, nevertheless did not lend any comfort or support to the Court's order that any teacher dissatisfied with the board's decision could obtain a *de novo* hearing before a county court on *all issues*. The Supreme Court impliedly rebuked the Wisconsin court for "fashioning" the remedy referred to by stating (a) that a decisionmaker is not disqualified because he has taken a position on a policy issue related to the dispute (and, I submit, the manner of performance by a school superintendent does involve a policy issue insofar as board members are concerned) and (b) that state law vests the government or policy-maikng function exclusively in the school board; the federal courts must guard against altering the statutory powers of a state created board as a matter of federal due process.

I readily agree that 70 O.S.A. § 6-103, prior to the 1975 amendments, under which the board proceeded in the instant case, lacked both procedural and substantive due process. Even so, in each case we must look to the record in order to ascertain whether, *in fact*, the complaining party has been provided a fair and adequate notice of charges, a proper opportunity to be heard, to confront witnesses, appear with counsel and—most significantly—whether the board rendered adequate findings of fact (or adequately stated reasons) for its ultimate decision from which state courts could, upon appeal and review, determine whether the board's *decision* is based on substantial evidence and is not arbitrary, capricious or unreasonable. This, to me, should be the *sole* concern of the courts. If the respective state legislative bodies determine, as Oklahoma has, to provide substantially more right of review, *de novo* or otherwise, that is a determination reserved to the states.

My cursory review of applicable statutes in the states of our Circuit indicates that those of Colorado (C.R.S. 1973, Art. 63, § 22-63-117), Kansas (K.S.A., 1974 Supp. §§ 72-5436 through 72-5445, L. 1974 Ch. 301) and Utah (Utah Code

Anno. 1953, 1975 Supp., Vol. 5B, §§ 53-51-1 through 53-51-9) likely "pass muster" when measured against the due process commands of the majority opinion in the instant case. However, the same does not appear true for the States of New Mexico and Wyoming. Both Statutory arrangements (N.M.S., 1953, Anno., 1975 Supp., §§ 77-8-12 through 77-8-17; Wyoming Statutes, 1957, 1975 Cum. Supp., Vol. 6, §§ 21.1-151 through 21.1-164) provide for hearings before the school board, with procedural and substantive due process requirements equal to those prescribed under the model Administrative Procedure Act, with full review accorded. The Supreme Courts of both states have held that there is no deprivation of due process, *per se,* resulting from dismissal proceedings conducted by the very board which through one or more of its members or an agent has (a) given notice of the determination to dismiss before the hearing and (b) submitted a statement of "cause" if a hearing should be requested by the teacher, and thereafter heard and decided the issues presented. Upon a required complete record of the proceedings, the appellate courts examine to determine whether there is substantial evidence in support of the board's findings and conclusions. If the courts determine that the board acted arbitrarily, capriciously or unreasonably, the decision is set aside. *See:* Monahan v. Board of Trustees, etc., County of Fremont, 486 P.2d 235 (Wyo. 1971); Wickersham v. New Mexico State Board of Education, 81 N.M. 188, 464 P.2d 918 (1970).

In my view the procedure above related provides adequate due process guarantees. Regardless of any pre-hearing bias or prejudice such as that attributed to Mayes, Wade and Moore, the reviewing courts must examine the complete record of the administrative proceedings and determine (a) whether procedural due process was accorded and (b) whether the dismissal was justified *on the merits based on substantial evidence.* Given the above related due process protections which I believe any person occupying a position such as that of Superintendent Staton is entitled, I would

not hesitate to follow and apply the rule we laid down in *Brinkley, supra.*

MARCH TERM—April 11, 1977

Before The Honorable David T. Lewis, Chief Judge,

The Honorable Delmas C. Hill, Senior Judge,

The Honorable Oliver Seth, Circuit Judge,

The Honorable William J. Holloway, Jr., Circuit Judge,

The Honorable Robert H. McWilliams, Circuit Judge,

The Honorable James E. Barrett, Circuit Judge, and

The Honorable William E. Doyle, Circuit Judge

No. 75-1332

JON TOM STATON, *Plaintiff-Appellant,*

vs.

JAMES K. MAYES, MOODY WADE, MIKE MOORE and INDEPENDENT SCHOOL DISTRICT NUMBER 20 OF MUSKOGEE COUNTY, OKLAHOMA, *Defendants-Appellees.*

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, it is ordered:

1) that the attached page 20 is filed in lieu of page 20 in the original opinion of this Court filed February 15, 1977;

2) that the petition for rehearing by the hearing panel is denied by order of Circuit Judges Holloway and Doyle. Judge Barrett voted to grant rehearing;

3) that the Court having been polled on the suggestion for rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, rehearing en banc is denied by Circuit Judges

Hill, Holloway, McWilliams and Doyle. Chief Judge Lewis and Circuit Judges Seth and Barrett voted to grant rehearing en banc.

HOWARD K. PHILLIPS, Clerk
/s/ by ROBERT L. HOECKER
ROBERT L. HOECKER
Chief Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 73-112 Civil

JON TOM STATON, *Plaintiff*

vs

JAMES K. MAYES, MOODY WADE, MIKE MOORE, and INDEPENDENT SCHOOL DISTRICT NUMBER 20 OF MUSKOGEE COUNTY, OKLAHOMA, *Defendants.*

(FILED APRIL 5, 1975)

Judgment

This cause came on for trial before the Court, and the evidence having been heard and the Court having filed a Memorandum Opinion herein on March 31, 1975 which Memorandum Opinion incorporates the findings of fact, conclusions of law and decision of the Court,

IT IS ORDERED that Judgment be now entered herein dismissing Plaintiff's action as to all Defendants.

Dated this 3rd day of April, 1975.

/s/ FRED DAUGHERTY
Fred Daugherty
United States District
Judge

(Caption Omitted in Printing)

(Filed March 31, 1975)

Memorandum Opinion

Plaintiff was Superintendent of Defendant School District. The individual Defendants are members of the Board of Education (Board) of Defendant School District. For sometime Defendant Moore had been displeased with Plaintiff's services and had voted several times against renewing his annual contract. Defendant Wade had voted on one previous occasion not to renew Plaintiff's contract. However, Moore and Wade had been outvoted and a majority of the Board had approved annual contracts for Plaintiff for several years past. A School Board election was to be held in January of 1973. Normally Plaintiff's contract had been renewed each year by the Board (for a one year period starting the following July 1) following the School Board Election. Defendant Mayes ran for the School Board on?? ——— that he would vote for a change in the Superintendent and Defendant Moore and Wade had both previously voted not to renew the Plaintiff's contract, if Mayes was successful in his race, a majority of the five-member board would be in office in early 1973 who might not renew Plaintiff's contract for the year starting July 1, 1973. In this situation the old Board which had supported the Plaintiff by a majority vote chose to break with customary practice and voted on December 4, 1972 to employ the Plaintiff for the year beginning July 1, 1973. This action obviously was to prevent Mayes, if elected, from voting on the Superintendent's contract for the year beginning July 1, 1973. Defendant Mayes was elected in January, 1973 and took office on February 5, 1973. On February 6, 1973 the School Board met, organized and voted the proposed dismissal of the Plaintiff on the statutory charges of willful neglect of duty and incompetence.

The procedure for dismissing one in Plaintiff's position [1] is prescribed by Oklahoma law in 70 Oklahoma Statutes § 6-103 which provides in pertinent part as follows:

> "§ 6-103. Dismissal of teacher—Grounds—Notice—Hearing
>
> Upon hearing as hereinafter provided, any teacher may be dismissed at any time for immorality, willful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government, or any reason involving moral turpitude. Before any teacher may be dismissed, written notice of the proposed dismissal shall be given him by the board of education in independent school districts, or by the county superintendent of schools in dependent school districts. Said notice shall contain a statement of the charges upon which a hearing is sought and by whom brought. The teacher complained of shall be notified of the date of the hearing, which shall be not less than ten (10) days from the date of said notice. The teacher shall be entitled to be present and to be represented by counsel. In the case of a teacher in a dependent school district, the hearing shall be before the county superintendent of schools and the board of education of the district in which the teacher is employed. In independent school districts it shall be before the board of education of such school district. In all cases a majority vote of those constituting the board, before which said hearing is held, shall be required in order to sustain the charges against the teacher charged and in dependent school districts the county superintendent of schools must concur. Provided in cases involving incom-

[1] Plaintiff was a District Superintendent. 70 Oklahoma Statutes § 6-103 is entitled Dismissal of teacher. But 70 Oklahoma Statutes § 1-116 provides that the term "teacher" in the Act means and includes one employed as a District Superintendent.

petency or neglect of duty, the decision arrived at at said hearing shall be final and in those involving moral turpitude an appeal may be taken to the district court of the county."

The written Board notice of the proposed dismissal of the Plaintiff, dated February 6, 1973, was as follows:

"February 6, 1973
Muskogee, Oklahoma

Dr. Jon Tom Staton
4301 West Broadway
Muskogee, Oklahoma 74401

Dear Dr. Staton:

The Muskogee School Board of District I-20 has voted to dismiss you as Superintendent of Schools for said District.

Please be advised that this is a notice of the proposed dismissal and that the charges against you are willful neglect of duty and incompetency. These charges are brought by this School Board.

Please further be advised that a hearing on the proposed dismissal shall be held at the Education Center, 570 North 6th Street, Muskogee, Oklahoma on February 19, 1973, at 7:30 P. M.

Please be further advised that you are entitled to be present and represented by counsel at said hearing.

Yours very truly,
MIKE MOORE
President of the Muskogee
School Board, District I-20"

On February 19, 1973 the hearing commenced. It was concluded on February 20, 1973 and in all about eight hours were consumed in the hearing. The Plaintiff appeared at the hearing on February 19 and 20, 1973 with counsel and certain objections were made on February 19, 1973 to include a complaint of inadequate notice of the hearing and that the Board as a tribunal in this case was biased against the Plaintiff. After the hearing the Board on February 22, 1973 by a three to one vote with one member absent dismissed Plaintiff on grounds of willful neglect of duty and incompetence.

Plaintiff then brought this action against Defendants under 42 U.S.C. § 1983 in which he claimed that the Defendants in dismissing him were acting under color of State law and deprived him of procedural due process in violation of his Constitutional rights. As the Defendant School District is not a "person" under 42 U.S.C. § 1983 it was on Motion dismissed out of the case. Plaintiff then filed an Amended Complaint alleging jurisdiction as to the School District and the individual Defendants under 28 U.S.C. § 1331 (federal question).

The relief sought by Plaintiff is reinstatement for the balance of his contractual period to June 30, 1974 (which date has passed during the pendency of this litigation), expungement of the Minutes of the Board Meetings which make reference to Plaintiff being incompetent or willfully negligent in the performance of his duties, damages against all Defendants, jointly and severally, in the sum of $32,291.62 for loss of wages, punitive damages in an unspecified amount and attorney fees and costs.

Of the several grounds raised at the hearing and in the Complaint herein, as amended, the case was tried to the Court on only two grounds, namely, inadequate notice of the hearing and Plaintiff was dismissed by a biased tribunal. In defense the Defendants contend that the Plaintiff was afforded procedural due process as to both the notice and the hearing. It is also urged that the Defendant School District is not a "person" under 42 U.S.C. § 1983 as decided in *City of Kenosha, Wis.* v. *Bruno,* 411

U.S. 904, 336 L. Ed. 2d 193, 93 S.Ct. 1525 (1937) and that the individual Defendant School Board members have a qualified governmental immunity from damages, *Smith* v. *Losee*, 485 F. 2d 334 (Tenth Cir. 1973).

The Court will first observe that the recent decision of the United States Supreme Court in *Wood* v. *Strickland*, —— U.S. ——, ——L.Ed. 2d ——, ——S.Ct. —— (1975) provides that 42 U.S.C. § 1983 does not extend the right to relitigate in Federal Courts evidentiary questions arising in school proceedings and was not intended to be a vehicle for Federal Court correction of errors in the exercise of school officials' discretion that do not rise to the level of violations of specific constitutional guarantees. Hence, under this case and the issues presented herein, this Court will not be concerned with reference to the wisdom or merits of the discretionary decision of a majority of the Board that Plaintiff was guilty as charged and should be dismissed. Suffice it to say in passing that the transcript of the hearing of February 19 and 20, 1973 does reveal evidence of shortcomings of the Plaintiff which could amount to a willful neglect of duty and incompetence in the judgment and discretion of the Board.

Notice

Plaintiff's employment with the Defendant School District amounted to a property right. *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972); *Perry* v. *Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972). In a move to dismiss Plaintiffs he was entitled to procedural due process. The meaning of procedural due process is that the party whose rights are to be affected is entitled to notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Fuentes* v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972). Plaintiff was fully heard and had the assistance of counsel. But he complains that the notice of the

hearing deprived him of procedural due process because the same, "contains no specifications as to what constituted incompetence or willful neglect of duty, . . .".

The notice was in the language of the statute. The hearing was to determine if the Plaintiff should be dismissed from his position as Superintendent. The reasons, grounds or charges upon which dismissal was proposed were set out in the notice. The statutory language of a charge is ordinarily sufficient to support a criminal indictment. *United States* v. *Kimball*, 441 F. 2d 505 (Tenth Cir. 1971). Hence, it should suffice to support this civil proceeding. Moreover, Plaintiff asked or no bill of particulars nor moved to make the notice more definite though he had thirteen days in which to do this, first raised the claim of inadequate notice after the store of the hearing, did not seek a continuance either before or during the hearing because of an alleged inadequate notice and from the transcript of the hearing it appears that Plaintiff fully realized what he had to meet at the hearing and he did meet the same with his evidence which followed that first offered. Furthermore, Plaintiff has shown no prejudice as a result of the contents of the notice of February 6, 1973. The issues appear to have been thoroughoy exhausted at the hearing and Plaintiff was heard in a meaningful time and manner. In these circumstances, and as the requirements of due process cannot be ascertained through the mechanical application of a formula, *Groppi* v. *Leslie*, 404 U.S. 496, 92 S.Ct. 582, 30 L.Ed. 2d 632 (1972), it is concluded that the notice was adequate and met the requirements of procedural due process. *Connecticut St. Dept. of Pub. W.* v. *Department of H., E. & W.*, 448 F. 2d 209 (Second Cir. 1971).

Biased Tribunal

Plaintiff's second contention is that bias and prejudice against him on the part of a majority of the members of

the Board acting as a tribunal in his dismissal constituted a denial of procedural due process. He contents that the three Defendants herein through previous votes on Plaintiff's annual contracts or through public statements had committed themselves to discharge the Plaintiff.

Defendants contend and urge that the provisions of 70 Oklahoma Statutes § 6-103, *supra,* establish the procedure for the dismissal of teachers (and district superintendents) and provide that such dismissal hearings shall be before the duly elected Board of Education of an independent school district. They contend that this statutory procedure does not contain provisions for disqualification of Board members who are elected by the people for any reason and further contend that provisions for alternate members of the Board in the event of disqualification do not exist. The statute requires that a dismissal can only be sustained by a majority vote of those constituting the duly elected Board. The record made at the hearing on February 19 and 20, 1973 discloses that Plaintiff recognized that there was no statutory procedure for requesting that Board members disqualify from participating in the dismissal hearing when he objected to the bias of the Board.

The evidence discloses that the dismissal hearing was conducted in conformance with the statutory provisions. The contention of Plaintiff that the Board was biased for the reason that it was first required to vote to propose the dismissal of Plaintiff and then conduct the hearing relating to the same is an insufficient showing of an infringement of procedural due process. There are many federal agencies who operate as investigators, chargers, prosecutors and triers. See *Kennecott Copper Corporation* v. *F.T.C.*, 467 F.2d 67 (Tenth Cir. 1972). This case said:

> "On the first point this court pointed out in an early case, Brinkley v. Hassig, 83 F.2d 351, 357 (10th Cir. 1936), that the Federal Trade Commission combines the functions of investigator, prosecutor and judge and that Congress designed it in that manner. Thus Kennecott's complaint goes to the nature of the law itself. As to this, the courts have uniformly held that this feature does not make out an infringement of the due process clause of the Fifth Amendment."

Directly in point is the holding from our Circuit in *Brinkley* v. *Hassig,* 83 F. (2d) 351 (Tenth Cir. 1936) which involved a medical license revocation hearing before a State Medical Board. The Board and its membership were established by State law. There was no provision for disqualification of the statutory members of the Board. The Court said:

> "From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. If the law provides for a substitution of personnel on a board or court, or if another tribunal exists to which resort may be had, a disqualified member may not act. But where no such provision is made, the law cannot be nullified or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal. In Evans v. Gore, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887, 11 A.L.R. 519, a question arose in which the members of the court had a direct personal financial interest. Adverting to this regretful circumstance, the court declined to renounce jurisdiction which appellant was entitled to invoke since 'there was no other appellate tribunal to which under the law he could go.' Cases have arisen where all the members of state Supreme Courts have been jointly sued by disappointed litigants; confronted with the choice of denying the suitor his right of appeal or hearing it themselves, the courts have heard the appeal. An exhaustive note

gathering and analyzing the cases from twelve states and from England and Canada may be found in 39 A.L.R. 1476. Other authorities may be found in 42 L.R.A. (N.S.) 788, L.R.A. 1915E, p. 858, and in 33 C.J. 989, and 15 R.C.L. 541. In Stahl v. Board of Sup'rs, 187 Iowa, 1342, 175 N.W. 772, 777, 11 A.L.R. 185, the court suggested that one so disqualified might resign. But the law does not require a member of a court of a tribunal to resign his position because of an isolated case where he must act although interested. The trial court, after patiently hearing the evidence as to the attitude of mind of the individual members, disposed of the contention in this language with which we are in accord:

> 'Under the general terms of the statute, the Medical Board is empowered to protect the public against conduct which is clearly against public interests and therefore necessarily unprofessional, the same as if the legislature had specifically denounced and prohibits such practice. The members of the Board were not disqualified because they knew of his methods prior to the hearing and condemned them. John R. Brinkley's methods were so notorious that ignorance of them by members of the board was an impossibility and such knowledge compelled condemnation.' "

Also see *Marquette Cement Mfg. Co.* v. *Federal Trade Commission,* 147 F. 2d 589 (Seventh Cir. 1945) which holds that under rule of necessity, a court or administrative agency will not be disqualified to determine act issues before it on ground of prejudice, bias, or prejudgment of issues, where there is no statutory provision for change of venue or no other court or agency has power to act in the premises. This situation was also present in the cases of *Simard* v. *Board of Education of Town of Groton,* 473 F.

2d 988 (Second Cir. 1973) and *Swab* v. *Cedar Rapids Community School District,* 494 F. 2d 353 (Eighth Cir. 1974). In *Simard, supra,* the Court stated:

> ". . . Due process does not invariably require the procedural safeguards accorded in a criminal proceeding. Rather '[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' "

In applying such concepts to school personnel situations, the Court stated further:

> ". . . While it is desirable that the administrative hearing be clothed 'not only with every element of fairness but with the very appearance of complete fairness,' Amos Treat & Co. v. SEC, 113 U.S.App. D.C. 100, 306 F. 2d 260, 267 (1962), we would not mandate individual disqualifications in the circumstances of this case. School boards frequently negotiate with teachers in their capacity as bargaining representative. The constitutional rule sought here would require that decisions as to teacher competence be surrendered to a body less familiar with relevant considerations and not responsible under state and local law for making these decisions. Moreover, it is unrealistic to require a Connecticut town to provide more than one body to deal with various aspects of school administration. We do not believe that due process, varying as it does with differing factual contexts, requires so much in this case, absent a showing of actual, rather than potential, bias."

In *Lopez* v. *Williams,* 372 F. Supp. 1279 (S.D. Ohio 1973) it was held in a school case that due process is satisfied if procedures are reasonably calculated to be fair and lead to reliable determinations of factual issues involved.

In *Arnett* v. *Kennedy*, 416 134, 94 S.Ct. ——, 40 L.Ed. 2d 15, (1974) the United States Supreme Court said:

> "The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests."

And in *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 81 S.Ct. 1743, 8 L. Ed. 2d 1230 (1961) the United States Supreme Court said:

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."

In the instant case the members of the Board elected by the people were charged by law with governing the affairs of the School District. The members of the Board were charged with employing the Superintendent who is the executive officer of the Board and who is required to perform such duties as the Board directs.[2] The Board members are thus required to have frequent dealings and direct contacts with a person in Plaintiff's former position as their Superintendent. The Board may also dismiss their Superintendent for the reasons and under the procedure set out in 70 Oklahoma Statutes § 6-103, *supra*. It would thus be impossible for a Board to consider the dismissal of a Superintendent pursuant to Oklahoma stautes without every member of the Board having some personal knowledge of the competence and activities of such person prior to the conduct of a hearing. Indeed, it might well be argued in this case that two members of the Board were biased in favor of the Plaintiff and that prior to the election of Defendant Mayes three members of the Board were biased in favor of the Plaintiff. The

[2] 70 Oklahoma Statutes 1971 § 5-106.

conduct of Defendant Mayes in making campaign statements in an election by the people to the effect that a change in the Superintendent should be made is not improper in our democratic system. The employment and dismissal of a Superintendent is a statutory duty imposed on the Board members. If the electorate feels such a change should be made, the only way such can be accomplished is through their duly elected members of the Board. The prior pronouncements of Defendant Mayes appear to support a possibility of bias against the Plaintiff, but do not support a finding of actual bias as would affect his performing his statutory duty as a Board member in the dismissal hearing of February 19 and 20, 1973. The fact that Defendants Moore and Wade had failed to support Plaintiff on prior occasions likewise do not support a finding of actual bias in this regard. It is possible they had good cause therefor from their official relationship with the Plaintiff. All three Defendants testified that their decision to dismiss the Plaintiff was based solely on the evidence at the statutory hearing of February 19 and 20, 1973 and for the reasons set forth in the charges. Plaintiff was given proper and adequate notice of the hearing as heretofore determined and was given a full opportunity to cross examine witnesses against him and to present witnesses and evidence in his own behalf. He had counsel. The fact that the hearing lasted for approximately eight hours and Plaintiff presented twelve witnesses indicates Plaintiff was allowed to be fully heard. There is no complaint to the contrary. Due process is a flexible concept which must be applied as the situation demands. *Morrissey* v. *Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484 (1972). The situation in the instant case is that the competence of the chief executive officer of the Board had been questioned and the Board, which had the direct responsibility for the employment of its superintendent and for his dismissal in the event it was found he was not competent or had neglected his duties,

was required to exercise its statutory duty. The analogy suggested by Defendants that a Board would not be able to dismiss a superintendent actually known by the Board to have committed a felonious offense if all Board members were required to disqualify because they had knowledge of such offense would apply in the instant situation where incompetence and willful neglect of duty are involved. The Board by its very nature and responsibilities is best able to judge such matters and in the case of a Superintendent, the Board would under normal circumstances have observed or been exposed to at least some if not much of the conduct complained of.

The authorities relied on by Plaintiff are not in point with the situation at hand. They either involved criminal trials as opposed to this civil matter, or situations where either no notice or no hearing, or both, were provided, or situations where there was provided a procedure for disqualification with a substitute judge or tribunal available. Plaintiff cites no case involving a Board charged with the hiring and firing of one of its employees and what procedural due process is required in the dismissal of such employee, except *Cooley* v. *Board of Education of Forrest City Sch. Dist.*, 453 F. 2d 282 (Eighth Cir. 1972) and in that case there was no notice given to or a hearing conducted regarding the dismissal of the teacher involved. No challenge was made therein to the Board as a tribunal. A lack of due process was premised on no notice or hearing being afforded the teacher who was summarily dismissed.

The Defendants in the trial of the instant case each testified they voted to dismiss Plaintiff based upon the evidence presented in the hearing and after reaching the conclusion from the evidence presented at the hearing that he was incompetent and willfully neglectful in the discharge of his duties. Plaintiff has failed to establish he was denied procedural due process in connection with his dismissal under a procedure and tribunal established by

the Oklahoma Legislature and all the circumstances involved herein.

As the Court has determined that Plaintiff was afforded procedural due process in his dismissal both as to notice and the hearing before the statutory tribunal, it will not be necessary to treat with the other defenses raised herein by the Deendants.

Plaintiff's action herein against all Defendants should be dismissed.

Dated this 31 day of March, 1975.

/s/ FRED DAUGHERTY
Fred Daugherty
United States District Judge

Supreme Court, U. S.
FILED
JUN 13 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1625

JAMES K. MAYES, MOODY WADE, MIKE MOORE and INDEPENDENT SCHOOL DISTRICT NUMBER 20 OF MUSKOGEE COUNTY, OKLAHOMA,
Petitioners,

VERSUS

JON TOM STATON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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June, 1977

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUMMARY OF RULINGS

At the time of Dr. Staton's dismissal 70 Oklahoma Statutes, § 6-103, stated in part:

> ". . . Provided in cases involving incompetency or neglect of duty, the decision arrived at a said hearing shall be final and in those involving moral turpitude an appeal may be taken to the district court of the county."[1]

[1] 70 Oklahoma Statutes, § 6-103 has since been amended to correct this limitation.

On the same evening that Petitioner Mayes was sworn in as a member of the Board of Education, Petitioners passed the motion: "That Jon Tom Staton be dismissed . . . because of wilful neglect of duty and incompetence." A notice was sent to respondent which carried no further specificity of the charges. A farcical hearing was held and followed by a motion for dismissal that made no reference to even a verdict much less the charges or findings.

Respondent filed a complaint that among other things included a questioning of the constitutionality of old 70 Oklahoma Statutes, § 6-103, and the allegation that *no evidence* was produced at the hearing to support the charges. The District Court ruled out both contentions at pretrial, stated during the hearing:

> ". . . I don't propose to be a tribunal as to whether the plaintiff should stay or not stay. I don't think that is my office. I'm not reviewing an administrative decision. I have here, qualifiedly, a constitutional question, as I view it, or a deprivation thereof of a state officer. This is whether they deprived the plaintiff of his constitutional rights of notice and in presenting a biased tribunal."

And finally the District Court stated in the Memorandum Opinion (Petitioners' Appendix B p. 28a):

> ". . . 42 U.S.C. § 1983 does not extend the right to relitigate in Federal Courts evidentiary questions arising in school proceedings. . . . Hence, under this case and the issues presented herein, this court will not be concerned with reference to the wisdom or merits of the discretionary decision of a majority of the Board that plaintiff was guilty as charged and should be dismissed."

The dissenting judge in the Circuit Court opinion stated (Petitioners' Appendix A p. 20a):

> ". . . the reviewing courts must examine the complete record of the administrative proceedings and determine . . . (b) whether the dismissal was justified *on the merits based on substantial evidence.*"

With this we certainly agree. We properly complained and have maintained throughout this litigation that there was no evidence to support the charges. We further are convinced that due process is denied until we know the claims (both charges and what supports them) of our opponents and have a chance to rebut them. [We again note the dissent of the Circuit Judge (Petitioners' Appendix A p. 19a):

> ". . . we must look to the record in order to ascertain . . . whether the board rendered adequate findings of fact (or adequately stated reasons) for its ultimate decision from which state courts could, upon appeal and review, determine whether the board's decision is based on substantial evidence. . . ."]

SUBSTANTIVE DUE PROCESS

Respondent has complained, argued, and maintained during this litigation that due process was denied because:

(a) Testimony from the Board of Education revealed that Dr. Staton had never been warned of any shortcomings. *Bomar* v. *Keyes*, 162 F.2d 136 (C.A. 2d 1947), *cert. den.*, 322 U.S. 825.

(b) Petitioners still failed to give specific charges, even after objection at the administrative hearing, but specificity of charges should be automatic for due process. *Dunham* v. *Crosby*, 435 F.2d 1177 (C.A. 1970).

(c) The real reasons for dismissal were desegregation and teacher evaluation, and the administrative hearing revealed only a *post hoc* list of alleged administrative deficiencies. *Roane* v. *Callisburg Independent School District*, 511 F.2d 633 (C.A. 1975).

(d) 70 Oklahoma Statutes, § 6-103, at the time of dismissal was unconstitutional. *Goss* v. *Lopez*, 419 U.S. 565.

(e) Cause for dismissal was not shown. *Carter* v. *U. S.*, 407 F.2d 1238 (C.A. D.C. 1968).

(f) Board decision cannot cut across Constitutional guarantees without factual support. *St. Joseph Stock Yards* v. *U. S.*, 298 U.S. 38.

(g) Evidence must be clear, convincing and have rational basis. *Schneiderman* v. *U. S.*, 320 U.S. 118.

(h) Much of the evidence produced at the administrative hearing was opposed to First Amendment principles, illegal in Oklahoma and erroneous. *Cook County College Teachers Union* v. *Byrd*, 456 F.2d 882 (C.A. 7th 1972).

(i) Evidence showed no adverse effect on the operation of the schools. *Pickering* v. *Bd. of Education*, 391 U.S. 563.

(j) There was no finding of fact after the administrative hearing, and the District Court refused to even consider the sufficiency of the evidence. *Russo* v. *Central School District*, 469 F.2d 623 (C.A. 2d 1972).

(k) Lack of fact finding is comfortable "bed partner" for prejudice. *Pittsburg S. S. Co.* v. *NLRB*, 167 F.2d 126 (C.A. 6th 1948).

(l) Notice in only conclusory terms, coupled with no finding of fact, creates an impossibility for the appellate court. *Takeo Tadano* v. *Manney*, 160 F.2d 665 (C.A. 9th 1947).

The Circuit Court made a most critical conclusion related to these contentions (Petitioners' Appendix A pp. 12a, 13a):

> "On the record as a whole we are left with the firm conviction that this board decision cannot stand and that a mistake was made in the ruling denying the due process claim. *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 123."

Respondent had a monumental task in appealing the factual case to the Circuit Court in light of the District Court's lack of recognition of its proper course of action. *Shachtman* v. *Dulles*, 225 F.2d 938 (C.A. D.C. 1955). Concurring Opinion at 944. However, the Circuit Court found an impossible task as it observed the record in light of the mandate of Rule 52, F.R.Civ.P. A notice in only conclusory terms, a mass of nebulous testimony, no finding of fact, strong allegations of First Amendment infringements and a denial of both substantive and procedural redress by the District Court forced them to invoke the "clearly erroneous" standard. *United States* v. *United States Gypsum*, 33 U.S. 364, 395.

The Circuit Court's decision to remand to the Board of Education is imperative. The appellate courts cannot assume specific charges or findings for the Board of Education. *Johnson* v. *Branch*, 364 F.2d 177 (C.A. 4th 1966).

This point alone was sufficient to demand the Circuit Court's disposition of the case. Bias or prejudice of the tribunal might or might not be identified as the cause and still leave this deficiency in due process upon which the case would still have to turn.

NECESSITY

Respondent continues to contend that "necessity" was never an issue in this case. Dr. Staton made an appeal as provided under 70 Oklahoma Statutes, § 6-122, and a hearing date was set. This statutory process provided for a *de novo* hearing before a separate body and final appeal to the State Board of Education. Petitioners then aborted the hearing by obtaining an Attorney General's opinion that they could exclusively proceed under the old Title 70 Oklahoma Statutes, § 6-103, that provided for the board's decision on the charges of incompetency and wilful neglect of duty to be final.

The 1975 revision of 70 Oklahoma Statutes, § 6-103, has made moot any further question of its constitutionality. However, Respondent stated in the original complaint that the statute was unconstitutional. We again note a concurring thought even though it comes from the dissenting Circuit Judge's opinion (Petitioners' Appendix A p. 19a):

> "I readily agree that 70 OSA § 6-103, prior to the 1975 amendments, under which the Board proceeded in the instant case, lacked both procedural and substantive due process."

This case was not one which disqualification would have "destroyed the only tribunal with power on the premises." Petitioners revived a long hidden statute that had laid unchanged since before the days of statehood. They insisted upon the exclusive use of it to block the passageway to other statutory administrative hearing bodies with "power on the premises." It was therefore *by design, not necessity*, that Petitioners were solely in charge of Respondent's dismissal.

Petitioners inadvertently quote 70 Oklahoma Statutes, § 6-122, as it read before amendments of 1971 and 1972. The last paragraph of the statute had been changed before the dismissal of Respondent in 1973. This error is critical since the part of the statute that creates other hearing bodies with "power on the premises" is omitted in the petition. It is upon the statute, as it existed at time of Respondent's dismissal, that we base our statement that necessity was not an issue. Title 70 Oklahoma Statutes, § 6-122, as it read at the time of the 1973 Board hearing, was as follows:

> "The failure to renew a contract by the board of education of any teacher who has completed three (3) years shall not be effective, and such contract shall be renewed unless there is served on such teacher a written statement by such board containing a statement of causes for such action, which must include one of the following: immorality, wilful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government, or any reason involving moral turpitude. Such teacher shall be afforded an opportunity to appear before such board and confront his or her accusers, having the right to cross-examine and offer any evidence to refute the statements and a reconsideration of the action theretofore made by the board.

"Said notice of nonrenewal and the statement of causes shall be mailed to the teacher prior to the 10th of April notifying said teacher of the nonrenewal and a statement of causes. Said cause shall be set within twenty (20) days after receipt of said notice for a hearing before the board of education.

"Before final decision of the matter the teacher shall be allowed to appeal the action of the board to the Professional Practices Commission. Such commission shall allow the teacher to be heard and after reviewing the facts shall report its recommendation to the State Board of Education. Upon the receipt of the recommendation of the Professional Practices Commission, the State Board of Education, if requested by the teacher, shall fix a date, hour and place for hearing of the matter within ten (10) days and notify the teacher of such time and place. At such hearing both the teacher and the local board of education shall be advised of the action of the Professional Practices Commission and shall be allowed to be heard. Such hearing may be held in executive session if agreed on by all parties concerned.

"After review of the matter the State Board of Education shall issue its decision either confirming the action of the local board of education or issuing the finding that dismissal of said teacher was without sufficient cause and that said teacher was without fault in the premises, which decision shall be final. A finding that a teacher was dismissed without sufficient cause shall automatically extend for one year the contract of the teacher involved, during which period of time the board of education and the teacher shall negotiate in an effort to resolve their differences prior to April 10 of the succeeding year."

PETITIONERS' REASONS REBUTTED

Petitioners plead for the Court to determine the extent of the "rule of necessity," and to define the due process requirements in all similar cases. The case law shows that this astronomical task has so far evaded rigid definition. This Court has many times held that due process is a term that "negates any concept of inflexible procedures universally applicable to every imaginable situation." However, there is certainly an identifiable dividing line between the instant case and those cited by Petitioners that each have overwhelming evidence: *Brinkley* v. *Hassig*, 83 F.2d 351 (C.A. 10th 1936); *Simard* v. *Board of Education of Groton*, 473 F.2d 988 (C.A. 2nd 1973); or those where the charges were stipulated as true as in *Hortonville Joint School District Association No. 1* v. *Hortonville Education Association*, U.S. 49 L.Ed.2d 1 (1976); *Swab* v. *Cedar Rapids Community School District*, 494 F.2d 353 (C.A. 8th 1974).

Petitioners' third contention is erroneous wherein they assume that statutes in other states would be affected. The test upon which the Circuit Court decided the prejudice issue does not infringe in any way upon the judicial procedures as called for in the normal investigation and prosecution set out in such statutes. The Circuit Court on page 15 of the Opinion specifically so states. The cases cited there show that the "judicial" v. "extra-judicial" test as described in footnote 10 *Withrow* v. *Larkin*, 421 U.S. 35, 50, and the cases there cited, was used by the Circuit Court. We know of no state with statutes that provide for approval of such "extra-judicial" acts as the harassment and adverse public relations campaign to which Petitioners subjected Respondent far in advance of the consideration of a hearing.

We see a totally concurring effect of the application of the Circuit Court's ruling in light of rulings in the highest courts of the states. Petitioners cite *Monahan* v. *Board of Trustees, etc. County of Fremont*, 486 P.2d 235 (Wyo. 1971), to exhibit a conflict with state rulings (page 14 of their Petition). The state court's ruling there found that biased procedures aborted due process and specifically state that they do not even try to decide whether there was good cause. That case goes much farther than the instant case since it actually turned on "judicial" acts related to the hearing procedures.

We finally notice that Petitioners now state many times that the board opposed the "policies" of the superintendent, and that there was no "personal bitterness" in the action taken by the board. First, policy making is a function vested exclusively in the school board as noted by petitioners on page 13 of the petition. Second, the board minutes in the record, the administrative hearing record and the trial court record all reveal *personal* attacks on the Respondent by Petitioners. Third, there is not one scintilla of evidence that the superintendent's policies, procedures or practices were ever questioned, much less criticized privately or publicly by Petitioners. At the oral argument before the Circuit Court, counsel for Petitioners was specifically asked three times by Judge William E. Doyle why Respondent was fired. We still do not know. The Circuit Court noted that the notice was not adequate to satisfy due process but ruled that Respondent's objection to the notice at the administrative hearing came too late (Petitioners' Appendix A pp. 6a through 8a). Since there has been *no* finding of facts at any stage of the case, Respondent still is entirely in the dark,

to this day, as to what Petitioners allege were the reasons for his dismissal. We realize the need for Petitioners to establish that the reasoning was based on "policy" in light of the rulings in recent cases. However, we assert that this vague and conclusory allegation is made much too late for consideration.

CONCLUSION

Both the majority and dissenting opinions from the Circuit Court held that due process required at least some degree of fact finding. More than that, Respondent alleged in the complaint that there was no evidence to support the charges. Due to the difficulty that the courts have found in reaching and identifying the issue, this case is now in the fifth year of duration. We feel that solution properly may be reached through remand rather than appeal to a higher court. *Laney* v. *Holbrook*, Fla., 8 So.2d 465:

> "In the state of the record in which it appeared in the Circuit Court the judgment, if it could be called a judgment, or order of the County Board of Public Instruction should have been quashed and the cause remanded to the Board with instructions to make findings of fact with sufficient definiteness to advise the accused as to what facts the Board found sufficiently proven to substantiate the charges which would warrant the forfeiture of his position as Principal of the Public Schools of the City of Apopka in Orange County, Florida.
>
> "Having reached this conclusion, it would be improper for us at this time to express any opinion as to the sufficiency of the evidence to support any of the charges or to express any opinion as to whether or

not the charges, if found to be based on fact, are sufficient to warrant the expulsion of the plaintiff-in-error as Principal of the Public Schools, supra."

The Tenth Circuit Court concurred by remanding the instant case to the Board of Education via the trial court.

Respectfully submitted,

KAY WILSON, JR.
319 Court Street
Muskogee, Oklahoma 74401

Counsel for Respondent

June, 1977

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing instrument were served upon:

Michael S. Yaroschuk
918—16th Street, N.W.
Washington, D. C. 20006,

attorney for Petitioners, by mailing such true and correct copies, postage prepaid, this ..... day of June, 1977.

KAY WILSON, JR.
Attorney for Respondent